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No. 95-427

In The

Supreme Court of the United States

October Term, 1995

COUNTY OF SAGINAW; M.B. GOLDBERGER, D.O., individually and as Saginaw County Chief Medical Examiner,

Petitioners,

v.

DIANE M. WHALEY, et al.; WILLIAM E. JONES, et al.; CHRISTINE M. TUNNEY, et al.; RITA SHARRARD; LUCILLE JONES MILLER, et al.; GEORGE SAUNDERS, et al.; COUNTY OF TUSCOLA, through its governing body, Tuscola County Board of Commissioners; ARMANDO HERRERA, Executive Director of Mid Regional Tissue Center; ARMANDO HERRERA, individually, and d/b/a Central Michigan Eye Bank and Tissue Center, d/b/a Central Michigan Eye Bank; MID REGIONAL TISSUE CENTER, a Michigan non-profit corporation; SAGINAW COMMUNITY HOSPITAL, a county public hospital; LANKENAW HOSPITAL, a Pennsylvania non-profit corporation; CHRISTOPHER C. TAYLOR, individually, and as former Tuscola County Commissioner; HERBERT L. NIGG, M.D., individually; RONALD G. HINES, M.D., Pathologist for Tuscola County; IRVING M. RABER, M.D., a Pennsylvania professional corporation; JAMES W. BAKER, Personal Representative for the Estate of Armando Herrera, Deceased,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals From The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Plaintiffs brought these §1983 actions, alleging that the Defendants violated their Fourteenth Amendment procedural due process rights by removing the corneas of their recently deceased relatives. The question presented is whether the next of kin has a constitutionally protected property interest in a deceased relative's corneas enabling them to assert a procedural due process claim.

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From The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The County of Saginaw, Michigan and Dr. M. B. Goldberger, respectfully petition that a Writ of Certiorari will issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the unreported decision of the district court is attached at App. 14 to the Appendix of this Petition. The Opinion of the Court of Appeals for the Sixth Circuit is reported at 58 F.3d 1111 (1995), and attached at App. 1 to the Appendix of this Petition.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment on July 12, 1995. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Plaintiff's sole cause of action rests upon the Fourteenth Amendment's Procedural Due Process Clause in reference to whether the next of kin has a constitutionally protected property interest under State law in the corneas of the deceased.

I. STATEMENT OF THE CASE

A. Introduction.

This case involves the review of a purely legal question. As such, an extensive review of the facts involved is not required. For the purpose of this Petition, only, these Defendants rely upon the statement of facts set forth in the Opinion of the Sixth Circuit Court of Appeals, as follows:

> Generally, the Plaintiffs are the next of kin of deceased persons whose bodies were the object of autopsies by Dr. Ronald Hines at the Saginaw Community Hospital. Dr. Hines is a pathologist who is employed on a contract basis by the Saginaw and Tuscola County Medical Examiners to perform autopsies. Dr. Hines' diener, or assistant, was the now-deceased Armando Herrera, who, coincidentally, owned and operated the Central Michigan Eyebank and Tissue Center and was a certified "enucleator" – having the ability to remove eyes and corneas without causing damage to them. Herrera, as Hines' diener, apparently had a business arrangement with Saginaw and Tuscola Counties in which he would pay all the County's expenses in performing the autopsies whenever corneas were removed, and half those expenses when they were not.
>
> Pursuant to his duties assisting Dr. Hines, Herrera would sew up the body after Dr. Hines finished the autopsy. Allegedly, he would also remove the corneas and sometimes the eyeballs at this time and sell them out of his eyebank. In all of these cases, this was supposedly done without the next of kin's permission. According

to the district court's Opinion, in some cases, the next of kin were never asked, in other cases the next of kin specifically refused their consent. The Plaintiffs allege that this was authorized by both Tuscola and Saginaw Counties.

Once the removal of the corneas or eyeballs was discovered, the Plaintiff sued in state and federal court claiming both state and federal law violations. After the cases in federal court were consolidated, the Plaintiffs agreed to the dismissal of all federal claims except their claim that they were deprived of their Fourteenth Amendment right to procedural due process when the alleged state actors removed the decedent's eyeballs or corneas. (Appendix, pp. 3-4).

B. Legal Proceedings Below.

1. The District Court Proceedings.

Shortly after the suit was filed, and the cases consolidated by the Honorable Robert Cleland, United States District Court, Eastern District, Northern Division Michigan, these Defendants moved for dismissal of the Plaintiffs' remaining claim of procedural due process pursuant to Fed. R. Civ. P. 12(b)(6), arguing that under Michigan law, the next of kin does not have a constitutionally protected property interest in the corneas of the deceased, and therefore, the due process claim must be dismissed.

At oral argument in the district court, and as properly recognized by Judge Cleland in his Opinion, Plaintiffs conceded that the survival of their cause of action depended upon the Court's interpretation of *Brotherton v.*

Cleveland, 923 F.2d 472 (6th Cir., 1991). (Appendix, p. 18). In *Brotherton*, the Sixth Circuit held that the aggregate of rights under Ohio law formed the basis of a constitutionally protected property interest in the deceaseds' corneas by the next of kin. In his analysis, Judge Cleland concluded that the *Brotherton* decision rested upon the three legal principles found under Ohio law:

(1) Ohio Revised Code §2108.02(b), as part of the Uniform and Anatomical Gift Act;

(2) The decision in *Everman v. Davis*, 54 Ohio App. 3d 119 (1989), which in turn rested on Ohio Revised Code §313.14; and

(3) The decision in *Carney v. Knollwood Cemetery Association*, 33 Ohio App. 3d 31 (1986), (allowing a claim for disturbance of a body of a deceased relative). *Brotherton*, 923 F.2d at 482.

Thereafter, Judge Cleland tested these three principles and found that Michigan law expressly rejected the argument proffered by Plaintiffs that the next of kin had a constitutionally protected property interest in a deceased's corneas, concluding:

> *Michigan has expressly declined to recognize the property interest* in the body of a deceased person, but rather has carefully chosen to provide recovery and tort only when the right of burial of a deceased person without mutilation is violated . . . Since Michigan does not recognize any property interest in the deceased body of another, either expressly or implicitly, there can be no protection of that interest under the due process clause of the Fifth Amendment that would give rise to a cause of action under 42

USC §1983. (Emphasis added). (Appendix, pp. 25-26).

2. The Decision of the Sixth Circuit Court of Appeals

The Sixth Circuit also recognized that Plaintiffs' claims would rise or fall upon the *Brotherton* decision, and an analysis of Michigan law. The Court agreed that Plaintiffs were required to satisfy the elements identified by Judge Cleland. However, in reviewing the same case law and statutes reviewed by Judge Cleland, the Court concluded that the next of kin has a constitutionally protected property interest in the deceaseds' corneas. (Appendix, pp. 9-10). Recognizing that no Michigan case or statute expressly held that a next of kin has a constitutionally protected property interested in the deceaseds' corneas, the Sixth Circuit concluded that what is relevant for the *Brotherton* analysis is that the right to possess the body exist, not that the right was grounded in a Michigan statute or in the common law of Michigan. Therefore, the Court concluded that under Michigan law, the next of kin has a constitutionally protected property interest in the corneas of the deceased, and therefore, may bring a constitutional claim under the due process clause. (*Id.*, p. 12).

REASON FOR GRANTING THE PETITION

This case has much larger dimensions than its effect on Michigan law. Currently, we are in the midst of a revolution in medicine. Transplantation of human organs occur on an hourly rate, with startlingly success. Heart

and kidney transplants are now common operations. Cornea transplantation has enabled those previously blind to see for the very first time in their lives. As transplantation has gained medical and social recognition, the need for legal consistency and rationality in defining the rights which attach to the human organs gains greater importance on a national level as medical science perfects the techniques of transplantation and finds new uses for cadaveric tissues.

The common law principle adopted by the Michigan Supreme Court, Michigan's highest Court of last resort, in 1899, of "no property interest in dead bodies," and the subsequent legislative enactments of "Presumed Consent," permitting the gifting of corneas without notifying relatives, follows the federal policy of encouraging free access to organs and prohibiting their sale. These Defendants respectfully submit that at the very least, until there is more substantial uniformity in the law, a Court should refrain from discovering a new constitutionally protected property interest in laws of the states, where in this case, none exist. Clearly, the decision of the Sixth Circuit in the instant matter conflicts with Michigan law, the law of other circuit and state courts, and its impact can only confuse the legal determinations which bear on this very important issue.

This case is timely and presents a rare opportunity to provide guidance in the law, and to recognize the national importance of the same. Moreover, the decision below is erroneous and the issues that it addresses have a national impact.

A. The Decision of the Sixth Circuit Court of Appeals Conflicts with the Law of the State of Michigan.

1. The *Brotherton* Decision.

On or about February 15, 1989, Stephen Brotherton was found "pulseless" in an automobile and taken to the Bethesda Hospital in Cincinnati, Ohio, where he was pronounced dead on arrival. *Brotherton, supra,* 923 F.2d at 478. At the hospital, Deborah Brotherton, the wife of the decedent, was asked to make an anatomical gift. *(Id.)* She refused, knowing that Stephen Brotherton had strong feelings against such gifts. *(Id.)* The hospital recorded her refusal in its "report of death." *(Id.)*

Because suicide was suspected as the cause of death, an autopsy was performed by the Hamilton County Coroner. *Brotherton, supra,* 923 F.2d at 478. The coroner called in a technician from the Cincinnati Eye Bank to remove the corneas from the decedent's eyes pursuant to Ohio law. *(Id.)* It was the custom and policy of the Hamilton County Coroner's office not to request the decedent's consent prior to removing corneas. *(Id.)* Deborah Brotherton was not informed of this action until she read the autopsy report. *(Id.)*

On behalf of herself, her children and a class of persons similarly situated, Deborah Brotherton filed suit under 42 USC §1983 in Federal District Court, alleging that her husband's corneas had been taken without due process of law, and, in violation of the Equal Protection Clause. *(Id.)* The district court dismissed the Complaint on both grounds. *Brotherton v. Cleveland,* 733 F.Supp. 56

(SD, Ohio, 1989). Relying on Ohio case law and the relevant section of the Ohio code, the district court held that Ms. Brotherton was not deprived of a "property" interest because she only had the limited right to donate her husband's organs. (*Id.* at 59). The Court also dismissed the equal protection claim, holding that a person subject to autopsy did not compose a suspect class and that the rights of possession and consent in regard to a decedent's corneas did not constitute a fundamental right. (*Id.* at 59-60). Moreover, the Court examined state laws as a source of property rights and concluded that Ohio rejected the contention that "a surviving custodian has a property right in the body of a decedent." (*Id.* at 58).

The Sixth Circuit Court of Appeals reversed the decision, holding that Ohio recognized rights of the next of kin in the body of a dead relative, which in aggregate rose to the level of a "legitimate claim of entitlement." The Court's decision rested on three legal principles of Ohio law: (1) The Ohio Rev. Code §2108.02(B); (2) The decision of *Everman v. Davis*, 54 Ohio App. 3rd 119 (1989), which rested on Ohio Rev. Code §313.14; and (3) The decision of *Carney v. Knollwood Cemetery Association*, 33 Ohio App. 3rd 31 (1986) (allowing a claim for disturbance of the body of a deceased relative). *Brotherton, supra*, 923 F.2d at 482. The case was then remanded to the District Court for further proceedings.

On remand, the District Court, again, dismissed plaintiff's cause of action, this time on the basis of qualified immunity. (*Brotherton v. Cleveland*, 968 F.2d 1214 (1992) (unpublished decision of the Sixth Circuit Court of Appeals, Text on Westlaw). On appeal, the Sixth Circuit

affirmed the dismissal of one party on the basis of qualified immunity, affirmed the dismissal of the hospital as it did not act "under color of state law" for the purposes of §1983, and reversed the District Court's decision against one physician on the basis of his official capacity, as well as to an eye bank's involvement as a state actor.

2. Under Michigan Common Law, the Next of Kin Does Not Have a Property Interest in a Decedent's Corneas.

It is expressly stated in Michigan law, through its appellate decisions, that there is *no constitutionally protected property right* of the next of kin in a decedent's corneas, *Deeg v. City of Detroit*, 345 Mich 371, 375; 76 N.W.2d 16 (1956), and that the common law tort of interference with the right of burial of a deceased person without mutilation is not of "constitutional dimension." *Tillman v. Detroit Receiving Hospital*, 138 Mich. App. 683, 316 N.W.2d 275 (1985). The Sixth Circuit clearly erred in its analysis of Michigan case law to reach the contrary result.

The Michigan common law rule is grounded in the common law axiom that *no property rights exists in the body of a deceased* by the next of kin. History tells us that in England, soon after the Norman Conquest of 1066, the Church took over jurisdiction of the place of burial and the body of the dead because:

(1) The Church was best prepared to prevent sacrilege to the dead bodies;

(2) The Church owned the burial ground; and

(3) The Church had original probate jurisdiction after death. *Kuzenski, "Property in Dead Bodies,"* 9 Marq. L.R. 17, at 18 (1924).

So complete was its jurisdiction over dead bodies that the common law Courts of England continually refused to recognize that they had any jurisdiction whatsoever.

> But, though the heir has a property in the monuments and escutcheons of his ancestors, that he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least if not impiously, violate and disturb their remains when dead and buried. 2, BLACKSTONE COMMENTARIES, 429 (1756).

Following the English common law maxim, the Michigan Supreme Court adopted the rule that there is "no property right in a dead body," in *Keys v. Konkel*, 119 Mich. 550; 78 N.W. 649 (1899). In the same term, the Court considered *Doxtator v. Chicago and West Railroad Co*, 120 Mich. 596; 79 N.W. 922 (1899), wherein the question presented was whether there existed a tort of interference with the deceased body parts of the next of kin. The *Doxtator* Court held that such a tort exists, but given the fact that the Defendant had no knowledge of any direction as to the disposition of the amputated parts of the deceased, and was not, in fact, in error as to an unwarranted disposition of them, no liability could attach.

The conclusion that no constitutionally protected property interest in the body of the deceased through the next of kin was affirmed by the Michigan Supreme Court in *Deeg v. City of Detroit*, 345 Mich. 371; 76 N.W.2d 16, 19 (1956). In *Deeg*, the widow of the spouse, whose death

occurred as a result of a traffic accident, learned that after her husband's body was taken to a hospital, and declared dead, certain organs were removed and sent to a laboratory for analysis. The laboratory analysis resulted in the destruction of the removed organs, which, resulted in a lawsuit alleging the mutilation of body parts of the spouse's body without her consent was in violation of her right to the possession and value of the body. While acknowledging that a tort existed for interference with mutilation of a dead body, the Court reaffirmed that the common law principle established in *Keys*, and reaffirmed in *Doxtator*, remained: *there exists to property interest in a dead body.* (*Id.*)

Subsequent decisions of the Michigan Court of Appeals reaffirmed this point in recent years. See *Allinger v. Kell*, 102 Mich. App. 798; 302 N.W.2d 576 (1981); rev. on oth. gr. 411 Mich. 1053; and *Tillman v. Detroit Receiving Hospital*, 138 Mich. App. 683; 360 N.W.2d 275 (1984) ["While there is 'no property right in the next of kin to a dead body,' the right to possess her burial does not exist, *but this right does not rise to constitutional dimensions.*"] Citing *Deeg v. Detroit, supra* (Emphasis added).

In the instant case, the Sixth Circuit Court of Appeals erroneously interpreted the aforementioned cases to conclude that a constitutionally protected property right exists in the body of a deceased. The Court reasoned that because a tort action exists, that being, interference or mutilation of a deceased body, a property right must also exist. Obviously, at the very least, the grounds for recovery – property rights in the corneas and familial interests

therein, required the Court to employ questionable concepts in order to allow recovery. As noted by Deans Prosser and Keeton in their classic treatise:

> It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer. *Prosser and Keeton, TORTS,* 63 (5th Ed, 1984).

Clearly, the Sixth Circuit's decision conflicts with this Court's pronouncement in *Paul v. Davis,* 424 U.S. 693, 47 L. Ed. 2d 405; 96 S. Ct. 1155 (1976), that not every tort by a state official is a constitutional violation, and that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id.* at 700-701.

Plaintiffs claim is simply a tort action to recover for mental anguish based upon alleged intentional actions of the Defendants which may have caused them distress. This tort is recognized in Michigan law, and Plaintiffs choose not to pursue it. Rather, they sought a constitutional basis, and created the fiction that the corneas gave rise to a constitutionally protected property interest. As none exist under Michigan common law, and that the fiction of "property" was simply "evolved out of thin air," by the Sixth Circuit, it is very clear that Certiorari should be granted, or summary reversal provided in this matter.

3. The Michigan Statutory Law is Not the Source of a Constitutionally Protected Property Interest.

The Sixth Circuit Court of Appeals also mistakenly relied upon the Uniform Anatomical Gift Act, MCL 333.10101, et al.; MSA 14.15 (10101), et al., and the Medical Examiners Act, MCL 52.111, et al.; MSA 5.935, et al., to conclude that there exists a statutory basis of the next of kin having a constitutionally protected property interest in the corneas of the deceased.

(a) The Uniform Anatomical Gift Act.

The Uniform Anatomical Gift Act (UAGA) provides a model for state laws which encourage and regulate the donation of organs. 1987 UAGA §1(7), (8)(a) (U.L., at 8 Supp. 1990). All 50 states, including the District of Columbia, Guam and the Virgin Islands, have adopted some form of the UAGA. The intent of the Act is to standardize and facilitate the donation of organs for medical transplantation, research and educational purposes. (UAGA, 8(a) ULA at 2-4) (Supp. 1991). Key provisions describe: (1) who may be donors; (2) what parties are authorized as donees; and (3) the respective rights, duties and procedures to be followed in making and receiving anatomical gifts. See MCL 333.10101, et al.; MSA 14.15 (10101), et al. Paradoxically, the provisions of the UAGA have been used as rationale for argument against the recognition of property rights in human remains. In *Brotherton*, for example, the Honorable Charles Joiner, dissenting, noted that the Ohio enactment of the UAGA only provides the procedural protocol for organ donation.

Brotherton, supra, 923 F.2d at 484. In providing immunity for donees acting in good faith, Judge Joiner concluded that the Act expresses "no intention of disturbing the rule of law that there is no property right in dead bodies." (*Id.*).

Michigan has also enacted a portion of the Uniform Anatomical Gift Act providing for "presumed consent of the removal of corneas," which was established to accommodate the failure of the UAGA to adequately meet the demand for organs through voluntary donation. MCL 333.10202; MSA 14.15 (10202). In addition to increasing the supply of organs, "presumed consent" laws provide a humane alternative to consensual donation by not disturbing the family during the difficult times surrounding the death of a loved one.

In the instant case, these Defendants complied with the aforementioned statute in allegedly removing decedents' corneas. The autopsies were authorized by law due to the circumstances surrounding the decedents' deaths. These Defendants provided unopposed Affidavits to the district court in support of their Motion to Dismiss, which apparently was not considered by the Sixth Circuit, that they had no knowledge of any objection to the said removal by the decedents' next of kin. The removal did not alter these decedents' post-mortem facial appearance. Thus, Defendants were in compliance with the applicable statute in relation to their conduct in this matter and, therefore, are not liable to Plaintiffs. As such, Plaintiff's present claims were properly dismissed by the district court for failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6).

In any event, these Defendants are immune from Plaintiffs' claim based on the aforementioned statute for wrongfully allowing decedents' corneas to be removed, pursuant to the immunity granted in MCL 333.10203; MSA 14.15 (10203) and MCL 33.10108; MSA 14.15 (10108), which states as follows:

> The County Medical Examiner, the Assistant County Medical Examiner, a bank or storage facility, or any person authorized by the County Medical Examiner to remove the cornea of a deceased person *shall not be liable in civil action if it is subsequently alleged that authorization for the removal was required of the next of kin.* MCL 333.10203; MSA 14.15 (10203) (Emphasis added).
>
> * * *
>
> A person, including a hospital, who acts in good faith in accordance with the terms of this part are with the anatomical gift laws of another state or a foreign country *is not liable for damages in any civil action or subject to prosecution in any criminal proceedings for the Act.* MCL 333.10108; MSA 14.15 (10108) (Emphasis added).

According to these provisions, and the above arguments, clearly, the Sixth Circuit was in error in relying upon the Uniform Anatomical Gift Act to find a property interest in the decedents' corneas. Quite clearly, the Uniform Anatomical Gift Act simply provides a procedure for individuals to donate body parts. Plaintiffs' stipulation to dismiss their claim under the Uniform Anatomical Gift Act signifies their recognition of this principle. Clearly, this Act cannot be used to support their theory of a constitutionally protected property interest in the corneas of the next of kin either.

(b) The Medical Examiners Act.

The Michigan Legislature has enacted the Medical Examiners Act, which sets forth a comprehensive set of rules to regulate the powers and duties of medical examiners acting in the State of Michigan. See, MCL 52.111, et seq.; MSA 5.935 et seq. The portion the Sixth Circuit relied on, MCL 52.205; MSA 5.935(5), provides as follows:

> (4) The Medical Examiner must identify the decedent, and notify the next of kin as soon as possible;

The Court concluded that based upon the above-quoted provision, the Medical Examiners Act implies that the next of kin has a right to the decedents' relative body. (See Appendix, p. 11). Quite clearly, the Court's interpretation of the Medical Examiners Act in the instant case creates a right where none exists. A comparison of the *Brotherton* decision enforces this argument. In *Brotherton*, the Court reviewed the Ohio Medical Examiners Act, which provides as follows:

> **313.14 Notice to Relatives; Disposition of Property.**
>
> The Coroner shall notify any known relatives of a deceased person who meets death in the manner described by Section 313.2 of the Revised Code, by letter or otherwise. *The next of kin, other relatives, or friends of the deceased person in the order named, shall have prior right as to the disposition of the body of such deceased person.* (Emphasis added). Ohio Rev. Code 313.14.

Clearly, the Ohio Legislature contemplated, and enacted a law providing that the next of kin has a property interest in the deceased person's body. The Michigan Legislature, however, enacted a notice provision which requires the Examiner to notify the next of kin that a body is in their possession. Indeed, the Michigan Legislature has not created a property interest in the body, as it is inconsistent with the common law of the state. As such, the Sixth Circuit erred in reliance upon the Uniform Anatomical Gift Act, and the Michigan Medical Examiners Act to find that a constitutionally protected property interest exists under Michigan law.

B. The Decision of the Sixth Circuit Conflicts with Decisions of Other Circuit and State Courts, and the Grant of Certiorari will Likely Produce Guidance to Other Courts Throughout This Nation.

There are two basic questions concerning the procedural protection for property. First, when is governmental depriving someone of property, i.e., state action. Second, what constitutes "property." The more difficult issue relates to the definition of property.

The definition of property since this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d (1972), has centered on the concept of "entitlement." No systematic method of identifying property interest has been decided by this Court since *Roth*. Rather, this Court has taken a case-by-case approach labeling "property" as sufficiently important interest recognized by state law. See, *Logan v. Zimmerman Brush Co*, 455 U.S.

422, 430; 102 S. Ct. 1148; 71 L. Ed. 2d 265 (1982) ("The hallmark of property . . . is an individual's entitlement grounded in state law, which cannot be removed for cause. Once this characteristic is found, the types of interest protected as property are varied.") While state law may define an interest as "property," the viability of an individual's expectation in the interest must be independently examined to determine if there exists a legitimate claim of entitlement protected by the due process clause. *Memphis Light v. Craft*, 439 U.S. 1, 9; 98 S. Ct. 1554; 56 L. Ed. 2d 30 (1978).

Federal appellate courts have heard several § 1983 claims based on allegations of state deprivation of a survivor rights in a relative's remains, and concluded that a property interest does not exist under state law. In *Fuller v. Marx*, 724 F.2d 717 (8th Cir., 1984), the widow and children of a deceased prisoner sued the State Medical Examiner for negligent destruction of organs during the performance of an autopsy. The Plaintiff's claimed that the incineration of the decedent's organs deprived him of property rights. The Court held that although Arkansas law did recognize a "quasi-property" right in the corpse, the survivors had the ability to request preservation of the organs under state procedures, and therefore, they were not deprived of due process. *Fuller, supra*, 724 F.2d at 719. Thus, the recognition of a "quasi-property" right under state law is only the threshold issue in a constitutional claim of deprivation without due process.

Similarly, in *Arnaud v. Odom*, 870 F.2d 304 (5th Cir., 1989), cert. den. 493 U.S. 855 (1989), parents of dead infant twins claim that a County Coroner's experiments on the bodies of the children, in order to prepare himself

for expert testimony on another matter, constituted a deprivation of their property rights. After examining the statutory and common law of Louisiana, the Fifth Circuit Court of Appeals determined that the state recognized a "quasi-property" right of survivors in the remains of their deceased relatives. However, the Court held that the state provided adequate remedies through existing tort claims to satisfy post-deprivation due process requirements. *Arnaud, supra,* 870 F.2d at 309. As in *Fuller,* the Court in *Arnaud* relied on state law to determine the threshold issue of whether a "quasi-property" right in a corpse exists.

Further, in *Lawyer v. Kernodle,* 721 F.2d 632 (8th Cir., 1983), the Court of Appeals heard a husbands' challenge of the results of an autopsy performed on his deceased wife. Part of his claim included an alleged deprivation of his property rights pursuant to 42 USC §1983. The Court reviewed Missouri law and held that the duty to bury the dead did not confer a property right in the ordinary sense of the word, but merely allowed possession and control of the body for the purpose of a decent burial. *Lawyer, supra,* 721 F.2d at 634. Subsequently, the Court affirmed the dismissal of the constitutional claim because the Plaintiff failed to show a deprivation of any property interest, or that the Defendant physician had acted outside the scope of the statutory discretion.

In two other cases which are factually similar to the instant case, state courts have heard challenges to the statutorily authorized taking of corneal tissue during an autopsy. In *Florida v. Powell,* 497 S.2d 1188 (Fla., 1986), cert. den. 481 U.S. 1059 (1987), survivors challenged the constitutionality of a former presumed consent statute

which authorized a medical examiner to remove a decedent's corneas during an autopsy, unless he had knowledge of specific objections to his actions. The Florida statute parallels the Michigan one in the instant case. The Florida Supreme Court held that the statute was rationally related to the state's interest in restoring sight to the blind. *Powell, supra,* 497 S.2d at 1190-1192 ("All authorities generally agree that the next of kin have no property right in the remains of a decedent.") See also, *Fla. Stat. Ann. §732.9185 (1992 Supp.).* The *Powell* Court concluded that the survivors had no property right in a decedent's remains; and thus, they could not claim a deprivation under the State Constitution.

Further, in *Georgia Lions Eye Bank v. Lavant,* 255 Ga. 60, 335 S.E.2d 127 (Ga., 1985), cert. den. 475 U.S. 1084 (1986), Georgia's presumed consent statute withstood a due process challenge based on the taking of a decedent's infant corneas without notice or consent to the parents. Although Georgia recognized a quasi property right in a decedent's body, the right was limited to possession and control by surviving relatives. Thus, it was further limited by the power of the legislature to make or amend the state's common law. As such, the Court held that the survivor's right in the corpse did not rise to constitutional dimensions. *Lavant, supra,* 335 S.E.2d at 127-129. ("There is no constitutionally protected right in a decedent's body . . . ").

The foregoing review of the precedent rejecting property rights in corneas clearly reveals the recognition of the English common law principle that there is no property interest of the next of kin in the decedent's body. The need for judicial consistency in maintaining this rule has

practical significance, which is grounded in the increasing importance of human tissue to modern medicine. As demonstrated above, the Sixth Circuit's opinion in this case finding a new property interest under Michigan law, conflicts with Michigan case and statutory law, creates a split of authority, and presents substantial obstacles in maintaining a consistent and uniform policy goal of encouraging increased organ supplies.

C. The Question Presented is Important as the Sixth Circuits' Decision Will Have an Adverse Impact on the National Law if it Stands.

The key rationale of the recognition against property rights in the next of kin rests in the recognition of a significant organ shortage needed for medical transplantation, research, and experimentation. The "encouraged volunteerism" propounded by the enactment of the UAGA has generally been acknowledged as a failure. Congress and the Michigan Legislature provided a better solution to the shortage by denying property status to cadavers and mandating the conscription of organs through presumed consent laws. The decision to authorize the use of organs is most often made at the emotionally charged period surrounding the death of a loved one. Arguably, the likelihood of inducing a mourning family to permit the taking of a loved one's corneas at his or her death would be no greater than with monetary incentives than it currently is with the request for donation at this painful time.

Presently, the system of allocation, which is governed by the National Organ Transplant Act and the Uniform Anatomical Gift Act, relies on certain scientific and ethical considerations as criteria for distributing organs. If these standards were replaced by the principles of the marketplace, the access to organs will become controlled by a person's ability to pay. Such problems have recognized by Congress, resulting in the ban of the sale of organs. See 42 USC §274e (The National Organ Transplant Act).

Although provisions of the UAGA were cited as statutory evidence for the recognition of property rights by the Sixth Circuit in the instant case, the primary goal of the Act was to encourage volunteerism by standardizing and facilitating organ donation procedures among the states. In addition, the 1987 revision of the UAGA included an amendment prohibiting the sale or purchase of body parts, thereby reiterating the basic content of the NOTA. These enactments provide the primary public policy arguments against markets in human organs through a full recognition of property rights in dead bodies.

More fundamentally, the arguments against property rights in cadavers are framed by the moral and ethical repugnance to the idea of marketing in bodies. The common law theory adopted by the Michigan Supreme Court in *Keyes,* and its continued viability, reflects the traditional values mainly of respect and reverence to the decedent's body, or sympathy to the survivor, in solely permitting a tort cause of action to proceed, rather than finding a property interest in the decedent's body. *Tillman, supra.* These values are derived from the philosophical principles and moral arguments against having

property rights in human body. Early precedence recognizing some form of property ownership of the human body, such as slavery, Dickens, *The Control of Living Body Materials*, 27 U. Toronto L.J. 142, 144 (1977), the physical attachment or imprisonment of a debtor (*Id.*), and viewing one's wife as chattel, Scott, *The Body of Property*, 1981, p. 26, are no longer legally or philosophically acceptable theory. See also, Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 S. Cal. L. Rev. 207, 224 (1986). The same moral thought reflects the state of the law in Michigan, and a majority of others.

Incidents of the poor offering to sell body parts highlight these arguments against finding property interest in the human body. The ideals of justice require that one in need should not be deprived of life merely because of an inability to afford an organ. Even those proponents of recognition of property rights argue against the marketing of organs, and tissues because it would contradict the principles of personal anatomy and human dignity.

The foregoing principles and policies each purport to enhance the supply of organs available for medical uses. This Court will play a pivotal role in defining the survivor's rights in the human body, significantly impacting its use as a medical resource. In *Brotherton*, and in the instant case, the Sixth Circuit erroneously recognized an entitlement in a decedent's corneas, which had its source outside of state law. An analysis of both these decisions will lead this Court to the conclusion that the Sixth Circuit erred in defining property for constitutional adjudication, and did not contemplate the relevant societal

policies affecting future health and welfare for those who might benefit from the advances of medical technology.

III. CONCLUSION

These Defendants submit that the Sixth Circuit clearly erred in its analysis and conclusion finding a constitutionally protected property interest in a decedent's corneas. The real basis for recovery in these autopsy cases is that the surviving spouse alleged that they suffered mental anguish as a result of a purported intentional act of the Defendants, from which the result might have been anticipated by them, and as a result, they request compensation. A finding of a constitutionally protected property interest in the deceased spouses' corneas, through the next of kin, however, clearly is not supported by the law of the state of Michigan, and contrary to national policy.

Based upon the foregoing, these Defendants respectfully request this Honorable Court to enter an Order granting Defendant's Petition for Writ of Certiorari for full briefing and oral argument on the matter. Alternatively, these Defendants request this Court to summarily reverse and vacate the decision of the Sixth Circuit

Court of Appeals' decision in this matter, and reinstate the decision of the lower court below.

Respectfully submitted,

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Dated: September 12, 1995

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0205P (6th Cir.)
File Name: 95a0205p.06

No. 94-1451

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIANE M. WHALEY, et al., WILLIAM E. JONES, et al., CHRISTINE M. TUNNEY, et al., RITA SHARRARD, LUCILLE JONES MILLER, et al., GEORGE SAUNDERS, et al., *Plaintiffs-Appellants,* *v.* COUNTY OF TUSCOLA through its governing body, Tuscola County Board of Commissioners; ARMANDO HERRERA, Executive Director of Mid Regional Tissue Center; ARMANDO HERRERA, individually, and d/b/a Central Michigan Eye Bank; MID REGIONAL TISSUE CENTER, a Michigan Non-Profit corporation; SAGINAW COMMUNITY HOSPITAL a county public hospital; HERBERT L. NIGG, M.D., Individually; RONALD G. HINES, M.D., Pathologist for Tuscola County; IRVING M. RABER, M.D., A Pennsylvania professional corporation; COUNTY OF SAGINAW;	ON APPEAL from the United States District Court for the Eastern District of Michigan

M.B. GOLDBERGER, D.O., Individually and as Saginaw County Chief Medical Examiner; JAMES W. BAKER, PERSONAL REPRESENTATIVE FOR THE ESTATE OF ARMANDO HERRERA, DECEASED,
DEFENDANTS-APPELLEES,

LANKENAW HOSPITAL, a Pennsylvania non-profit corporation; CHRISTOPHER C. TAYLOR, individually, and as a former Tuscola County Commissioner,
Defendants.

Decided and Filed July 12, 1995

Before. BROWN, BOGGS, and NORRIS, Circuit Judges.

BAILEY BROWN, Circuit Judge. The plaintiffs brought these § 1983 actions claiming that the defendants violated their Fourteenth Amendment procedural due process rights by removing the corneas or eyeballs of their recently deceased relatives. The interesting question raised in this consolidated appeal is what relief the Constitution might provide when a state actor steals the eyes of a dead man. Specifically, we must decide whether Michigan law provides the next of kin with a constitutionally protected property interest in a deceased relative's body, including the eyes. The district court thought that it did not and dismissed the plaintiffs' claims. We

disagree, REVERSE the court's decision, and REMAND for further proceedings.[1]

I.

Because these cases present a purely legal question, we need not discuss the facts in great detail. Generally, the plaintiffs are the next of kin of deceased persons whose bodies were the object of autopsies by Dr. Ronald Hines at the Saginaw Community Hospital.[2] Dr. Hines is a pathologist who was employed on a contract basis by the Saginaw and Tuscola County Medical Examiners to perform autopsies. Dr. Hines's diener, or assistant, was the now-deceased Armando Herrera who, coincidently, owned and operated the Central Michigan Eye Bank and Tissue Center and was a certified "enucleator" – having

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[1] Several defendants ask us to affirm the district court's judgment on an alternative basis. Dr. Raber of Philadelphia, who allegedly bought eyes from Herrera (whose estate is a defendant), asks us to dismiss the case against him because the district court lacked personal jurisdiction. Dr. Raber notes that the district court dismissed Lankenaw Hospital, which he contends was the actual purchaser of the eyes, for that very reason. The plaintiffs argue that Lankenaw Hospital merely mailed Dr. Raber's check, and that Dr. Raber was indeed responsible for purchasing eyes. Dr. Nigg (now deceased) and Tuscola County ask us to grant summary judgment to them because Tuscola County had no practice or procedure authorizing the removal of corneas. The plaintiffs argue that they did have such a policy. The district court did not address these issues in its decision dismissing these cases, which it can do on remand. We therefore do not address these issues on appeal.

[2] In the case of the *Saunders* plaintiffs, the body was autopsied at Trenerry's Funeral Home.

the ability to remove eyes and corneas without causing damage to them. Herrera, as Hines's diener, apparently had a business agreement with Saginaw and Tuscola Counties, in which he would pay all the counties' expenses in performing the autopsies whenever corneas were removed, and half those expenses when they were not.

Pursuant to his duties assisting Dr. Hines, Herrera would sew up the body after Dr. Hines finished the autopsy. Allegedly, he would also remove the corneas and sometimes the eyeballs at this time and sell them out of his Eye Bank. In all of these cases, this was supposedly done without the next of kin's permission: According to the district court's opinion, in some cases the next of kin were never asked, in other cases the next of kin specifically refused to give their consent. The plaintiffs allege that this was authorized by both Tuscola and Saginaw Counties.

Once the removal of the corneas or eyeballs was discovered, the plaintiffs sued in state and federal court claiming both state and federal law violations. After the cases in federal court were consolidated, the plaintiffs agreed to the dismissal of all federal claims except their claim that they were deprived of their Fourteenth Amendment right to procedural due process when the alleged state actors removed the decedents' eyeballs or corneas. After hearing arguments, the court dismissed that claim under Federal Rule of Civil Procedure 12(b)(6), holding that Michigan law did not create an interest in a dead body sufficient to qualify as a "property interest" under the Fourteenth Amendment's Due Process Clause. The plaintiffs appealed.

II.

The Fourteenth Amendment only prohibits states from depriving a person of life, liberty, or property without due process of law, U.S. CONST. amend. XIV, § 1. It follows, then, that if state actors, such as the defendants are alleged to be, do not infringe on the life, liberty, or property of the plaintiffs, there can be no due process violation. This case deals with the "property" portion of the clause, i.e., whether the next of kin have a property interest in the body, including the eyes, of a deceased relative.

The existence of a property interest for due process purposes depends in large part on state law. According to the Supreme Court:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Also, " 'property' interests subject to procedural due process are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' " *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (*quoting Roth*, 408 U.S. at 571-72, 577). These rules and understandings may in turn create a "legitimate claim of entitlement," worthy of due process protection. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). Finally, whether a substantive interest created by the state rises to the level

of a constitutionally protected property interest is a question of federal constitutional law. *Id.* In making this determination, courts must look beyond the law's nomenclature and to its substance.

All parties agree that the existence under Michigan law of a constitutionally protected property interest in a dead relative's body turns on our opinion in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), where we found that such a property interest exists under Ohio law. The facts of *Brotherton* are similar to the facts here. Steven Brotherton was found dead and taken to the hospital. His wife refused to consent to the use of his body parts for transplant purposes. The coroner's office, pursuant to an established procedure, nevertheless removed Brotherton's corneas during the course of the autopsy. Upon discovery of this fact, his wife brought an action in federal court, alleging that her husband's corneas were removed without due process of law. As in this case, the district court dismissed the claim under Federal Rule of Civil Procedure 12(b)(6). We reversed, holding that Ohio law created a "legitimate claim of entitlement" and thus a property interest in a dead relative's body. *Id.* at 482.

In making this determination, we first noted that, traditionally, "property" is conceptualized as a bundle of rights which includes "the rights to possess, to use, to exclude, to profit, and to dispose." *Id.* at 481. We then examined Ohio law for indicia of these types of rights in a dead relative's body, and noted: (1) that Ohio's version of the Uniform Anatomical Gift Act, OHIO REV. CODE § 2108.02(B), grants the next of kin the right to control the disposal of the body; (2) that the Ohio Court of Appeals decision in *Everman v. Davis*, 561 N.E.2d 547 (Ohio Ct.

App. 1989), acknowledged that the next of kin have the right to possess the body for burial; and (3) that the Ohio Court of Appeals decision in *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430 (Ohio Ct. App. 1986), allows a claim by the next of kin against those who disturb a buried dead body. *Brotherton*, 923 F.2d at 482. Although both of these Ohio appellate court decisions stressed that a general "quasi-property" right in a dead body did not exist, we found this of only marginal relevance, noting that the existence of a constitutionally protected property interest did "not rest on the label attached to a right granted by the state but rather on the substance of the right." *Id.* Consequently, we held, "the aggregate of rights granted by the state of Ohio to [the next of kin] rises to the level of a 'legitimate claim of entitlement' in the [deceased person's] body, including his corneas, protected by the due process clause of the fourteenth amendment." *Id.*

Because *Brotherton* is the law of this Circuit, our decision in the present case turns on a comparison of Ohio and Michigan law. If Michigan recognizes the same basic rights in a deceased person's body as Ohio, then *Brotherton* controls and we must reverse the district court. After reviewing Ohio and Michigan law, we conclude that they are in substance the same regarding the next of kin's rights in a deceased relative's body. If anything, Michigan is even more explicit than Ohio in its acknowledgment of these rights.

For example, the *Carney* case relied upon in *Brotherton* involved a corpse that had been dug up and discarded by cemetery employees. *Carney*, 514 N.E.2d at 431. The Ohio Court of Appeals, while criticizing the notion that a "quasi-property right" existed in a decedent's

body, nevertheless agreed that a cause of action existed for mishandling a corpse. *Id.* at 435. The court, however, tied this cause of action to the tort of causing serious infliction of emotional distress, noting:

> "The law is not primarily concerned with the extent of physical injury to the bodily remains but with whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin. The tort rarely involves pecuniary injury; the generally recognized basis of damage is mental suffering."

Id. (quoting *Scarpaci v. Milwaukee County*, 292 N.W.2d 816, 820-21 (Wis. 1980)).

Everman v. Davis, 561 N.E.2d 547 (Ohio Ct. App. 1989), the other decision relied upon by the *Brotherton* court, did not directly deal with the status of the dead body as "property." Rather, it held only that a dead body is not an "effect" within the meaning of the Fourth Amendment (granting the people the right to be free from unreasonable searches and seizures in their "persons, houses, papers, and effects."). *Id.* at 550. The court in that case did note, however:

> There is no issue in this case of the possessory right of a spouse or other appropriate member of the family to the body of a deceased person for the purpose of preparation, mourning and burial. This right is recognized by law and by decisions. See [OHIO REV. CODE.] § 313.14.

Everman, 561 N.E.2d at 550. OHIO REV. CODE § 313.14 states that relatives "shall have a prior right as to the disposition of the body" of a deceased person.

Neither *Carney* nor *Everman* made a sweeping pronouncement of the next of kin's right to possess and prevent the mutilation of a decedent's body. *Carney* declared that the cause of action for mishandling a corpse was a derivative of the tort of causing emotional distress, and the statement in *Everman* was dicta, an offhand reference unnecessary to the court's decision. The *Brotherton* court nevertheless thought these decisions, with the Ohio statutes, were sufficient, and rightly so. When these Ohio cases, and the Ohio statute granting the next of kin the prior right to dispose of the body, and the Ohio Anatomical Act are taken together, it demonstrates that in Ohio there are existing "rules and understandings" which grant the next of kin the right to dispose of the body by making a gift of it, to prevent others from damaging the body, and to possess the body for purposes of burial. Such rights in an object are the heart and soul of the common law understanding of "property." It was therefore appropriate for the *Brotherton* court to decide that the next of kin had a legitimate claim of entitlement to the decedent's body.

Turning to Michigan law, its courts have explicitly held what Ohio courts have not: that the next of kin have a right to possess the body for burial and prevent its mutilation. The Supreme Court of Michigan has repeatedly held that the next of kin "[are] entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way." *Doxtator v. Chicago & W. Mich. R.R.*, 120 Mich. 596, 597 (1899) (acknowledging the right, but holding that, under the circumstances, neither the railroad nor the doctors

were liable); *Keyes v. Konkel*, 119 Mich. 550, 551 (1899) (acknowledging the right, but holding that there was no cause of action specifically in replevin); *Deeg v. City of Detroit*, 345 Mich. 371, 376 (1956) (acknowledging the right, but holding that it did not survive the next of kin's death).[3] Furthermore, Michigan's Anatomical Gift Act is the same as Ohio's. Both give the next of kin the choice of making a gift of all or part of the decedent's body, at least when there is no contrary intent evidenced by the decedent. *Compare* OHIO REVISED CODE § 2108.02(B) *with* MICH. STAT. ANN. § 14.15(10102)(2).

In short, Michigan law is virtually identical to Ohio's with regard to the rights it grants in a decedent's body. The next of kin have the right to dispose of the body in limited circumstances, possess the body for burial, and prevent its mutilation. Applying *Brotherton*, we therefore hold that Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative.

In its opinion dismissing these cases, the district court disagreed with this conclusion, reasoning that Michigan law could be distinguished from Ohio's. Specifically, it held:

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[3] The Michigan Court of Appeals has also noted that there is no privacy right in a dead relative's body, a question which is not at issue here. *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984). This issue here is whether the next of kin have an interest in the body of the deceased which rises to the level of a constitutionally protected property interest.

> Michigan law is sufficiently different from Ohio law to render the result different from that in *Brotherton*. Michigan has expressly declined to recognize a property interest in the body of a deceased person but rather, has carefully chosen to provide recovery in tort only when the right of burial of a deceased person without mutilation is violated.

J.A. at 4217.

We believe the district court mistakenly focused on the label attached to the right rather than its substance. Although Michigan has repeatedly emphasized that "recovery in such cases is not for the damage to the corpse *as property*, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation," *Keyes*, 119 Mich. at 551, *Deeg*, 76 N.W.2d at 19, this is not dispositive. Ohio also took care to emphasize that the cause of action for mutilation of a corpse did not rest on damage to the dead body, but his did not aid the defendants' argument in *Brotherton*. More importantly, the way in which damages are measured does not necessarily define the substantive interest at stake. Michigan undoubtedly provides the next of kin with the right to possess and prevent the mutilation of a dead relative's body. How Michigan chooses to measure damages when that right is infringed is not determinative.[4] As discussed at oral argument, if a

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[4] We are puzzled by the district court's statement, in support of its conclusion, that "Michigan has specifically addressed this right to possess or control the disposition of a deceased person's body as one which carries redress in tort, and not in property, if violated." *J.A.* at 4213. We say this because tort law

woman's husband dies in a neighbor's yard, the neighbor cannot simply keep the body. In Michigan, he must either turn it over, or be liable. Just because the woman cannot technically "replevin" her husband's body does not mean she has no legitimate claim of entitlement to it. *See Keyes*, 119 Mich. at 551 (noting that "[i]n numerous cases equity has taken jurisdiction to prevent interference with the control of a dead body by persons entitled to control it").

The other factor by which the district court distinguished Michigan law from Ohio's is that OHIO REV. CODE § 313.14 explicitly states that the next of kin have a prior right as to the disposition of the body. No Michigan statute, on the other hand, makes such a clear statement. We do not believe, however, this affects the constitutional analysis. What was relevant in *Brotherton* was that the right to possess the body existed, not that the right was partially grounded in a state statute as opposed to state common law. Michigan common law clearly holds that the next of kin have the right to possess the body for burial. Furthermore, although no Michigan statute clearly states that there is such a right, it is nevertheless contemplated: MICH. STAT. ANN. § 5.953(5) states that "[t]he county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives or representatives of the deceased;" and MICH. STAT. ANN. § 5.953(8) requires the state to return the body "to the person entitled to the custody or possession of [it]." Both of these statutes imply that the next of kin do indeed have a "right" to the deceased relative's body.

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covers damage to both persons (e.g., battery) *and* property (e.g., trespass to land).

In reaching today's conclusion, we are mindful of the Supreme Court's admonition in *Paul v. Davis*, 424 U.S. 693 (1976), that not every tort by a state official is a constitutional violation, and that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 700-01. It is therefore important to note the limits of this decision. Although both Ohio and Michigan describe the cause of action for damaging a corpse as a personal injury tort, neither this case nor *Brotherton* suggest in any way that personal injury torts *in general* by state actors amount to constitutional violations. In both this case and *Brotherton*, the state cause of action for damaging a corpse explicitly acknowledges the next of kin's right to possess and prevent the mutilation of the dead body. Furthermore, the Anatomical Gift Acts of both states permit the next of kin to make a gift of the body in certain instances. Regardless of the legal label the State places on the rights in a dead body it chooses to create, these rights nevertheless exist. Moreover, they closely correspond with the "bundle of rights" by which property has been traditionally defined. For this reason alone, we conclude that Michigan, like Ohio, provides the next of kin with a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes. Accordingly, the next of kin may bring a constitutional claim under the Due Process Clause.

III.

We REVERSE the district court's decision, and REMAND for further proceedings.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DIANE WHALEY, et al,

Plaintiffs,

v. Case No: 92-CV-10103-BC

COUNTY OF SAGINAW, et al,

Defendants.

_____/

WILLIAM E. JONES, et al,

Plaintiffs,

v. Case No: 92-CV-10266-BC

COUNTY OF SAGINAW, et al,

Defendants.

_____/

CHRISTINE M. TUNNEY, et al,

Plaintiffs,

v. Case No: 92-CV-10267-BC

COUNTY OF SAGINAW, et al,

Defendants.

_____/

RITA SHARRARD,

Plaintiff,

v. Case No: 92-CV-10268-BC

COUNTY OF TUSCOLA, et al,

Defendants.

_____/

LUCILLE JONES MILLER, et al,

Plaintiffs,

v. Case No: 92-CV-10279-BC

COUNTY OF SAGINAW, et al,

Defendants.

_____/

GEORGE SAUNDERS, et al,

Plaintiffs,

v. Case No: 92-CV-10437-BC

COUNTY OF SAGINAW, et al,

Defendants.

_____/

ORDER GRANTING DEFENDANT'S MOTIONS TO DISMISS

I. Background

This matter is before the Court on defendants' motions to dismiss the action under Fed.R.Civ.P. 12(b)(6).[1] For the reasons stated below, the Court grants the motions to dismiss.

These consolidated cases are brought by family members of deceased persons from whose bodies organs were "harvested"[2] and sold by some of the defendants. In the Jones case, the family was present in the hospital when

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[1] Dr. Raber, defendant in the Whaley case, also requests dismissal based on lack of personal jurisdiction under Fed.R.Civ.P. 12(b)(2).

[2] a term used by defendants, *see, e.g., Defendant County of Saginaw and Dr. Goldberger's Motion to Dismiss Brief*, p. 3.

death was pronounced and the family was not asked their wishes prior to harvesting. In Sharrard, Whaley, Tunney, and Miller, the next of kin were asked but declined to give permission for donation of the deceased persons' organs. *Tr.*, September 29, 1993, oral argument (hereinafter, "*Tr.*").

Corneas were removed from the deceased persons in all these cases. In Saunders, eyeballs were removed as well. *Tr.*, p. 7.

The posture of the case at this time is such that the sole claim at issue here is denial of due process under 42 U.S.C. § 1983.[3] Plaintiffs' state law claims for interference with the right of burial of a deceased person without mutilation also remains a viable claim but will not remain in this Court since the federal claim is to be dismissed below. 28 U.S.C. § 1367(c)(3).

Plaintiffs seek redress against various defendants.[4] Defendants Goldberger and Varner are pathologists who performed the autopsies on the deceased persons. Defendant Hines was Saginaw County Medical Examiner and Defendant Nigg was Tuscola County medical examiner. Each of these two (Hines and Nigg) is sued based on his alleged failure to supervise Defendant Herrera who was allowed to serve as diener for the Saginaw Community

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[3] Plaintiffs' stipulated to dismissal of their claims based on violation of equal protection under 42 U.S.C. § 1983, violation of the Federal Transplantation Act found at 42 U.S.C. § 274e, and violation of the Uniform Anatomical Gift Act found at Mich. Comp. Laws § 333.10101, et seq., *Tr.*, pp. 6-7.

[4] All of the defendants, except for Trenerry Funeral Home and Dr. Herrera, have moved for dismissal.

Hospital's morgue. Defendant Herrera, d.b.a., Mid Regional Eye Bank and Tissue Center (now deceased and represented by his estate's personal representative) was a diener who conducted the actual harvests of corneas, and eyeballs as alleged in Saunders. Defendant Saginaw Community Hospital's morgue is the place where the autopsies and harvests were performed and is sued under the theory of breach of a duty to supervise Dr. Hines (vicarious liability). The counties are also sued under the theory of vicarious liability because the county medical examiner is a county official. Dr. Raber is sued because he purchased corneas from Mid Regional Tissue Center (Herrera).

II. Standard

The standard to be applied to deciding a motion to dismiss is as follows:

> This Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. A complaint need only give 'fair notice of what plaintiff's claim is and the grounds upon which it rests.' A judge may not grant a Fed.R.Civ.P.12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than a bare assertion of legal conclusions. 'In practice, a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.'

In Re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993) (internal citations omitted) (emphasis in original).

III. Discussion

As noted during oral argument, this case rises or falls – in this instance, falls – on the analysis provided by the Sixth Circuit in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).[5]

In *Brotherton*, plaintiff brought an action under 42 U.S.C. § 1983 for wrongful removal of her husband's corneas during an autopsy performed at Bethesda North Hospital in Hamilton County, Ohio. The custom and policy of the Hamilton County coroner's office was not to obtain consent from the next of kin before removing corneas nor was it the policy of the office to inspect medical records to determine whether any objection to removal was present in the records. *Id.* at 478.[6] When asked by the hospital, plaintiff had declined to consent to organ donation based on her knowledge of her husband's wishes. *Id.* at 478. Plaintiff's claim in *Brotherton*, as in this case, asserted that the practice of the coroner's office, acting under color of the presumed consent law found in

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[5] Plaintiff conceded that if Michigan law is concluded to be distinguishable from Ohio law such that *Brotherton, supra*, would not apply, plaintiffs' claims must fall.

[6] There is evidence to the contrary in the instant case. Defendants contend that the policy of the Saginaw County Medical Examiner's office is to obtain consent whenever practicable. Exhibit 3, Def. Saginaw County Response; *Tr.*, p. 27; *See also, Tr.*, 14; 16 (as to Dr. Nigg); 22 (as to Drs. Goldberger and Varner).

Ohio's adoption of the Uniform Anatomical Gift Act, violated procedural due process by failing to require predeprivation process. *Id.* at 479.

The Sixth Circuit held that Ohio created a property right equivalent to a "legitimate claim of entitlement" protected by the due process clause of the Fifth Amendment in plaintiff's deceased spouse's body, although Ohio had not labelled the right as such. *Id.* at 482. The Court further held that protection of this right required a predeprivation process. *Id.* Plaintiff in the instant case argues that Michigan law is sufficiently similar to Ohio law that *Brotherton* is on all fours and controls this case. The Court finds that Michigan law differs from Ohio law on this subject to such an extent that the instant result must differ from that in *Brotherton.*

The Court in *Brotherton* rested its holding on the sum of three legal principles found in Ohio law: (1) Ohio Rev. Code § 2108.02(B), as part of the Uniform Anatomical Gift Act; (2) the decision in *Everman v. Davis,* 54 Ohio App.3d 119 (1989), which, in turn rested on Ohio Rev. Code § 313.14; and (3) the decision in *Carney v. Knollwood Cemetery Ass'n,* 33 Ohio App.3d 31 (1986) (allowing a claim for disturbance of the body of a deceased relative). *Brotherton,* 923 F.2d at 482. The Court in *Brotherton* held that "the aggregate of rights granted by the state of Ohio to [plaintiff] rises to the level of a 'legitimate claim of entitlement' in [the deceased spouse's] body, including his corneas." *Id.* at 482. Indeed the Court's conclusion may be reached only by the sum of these three grounds, without all three, the result would be different.

To be sure, the *Brotherton* Court's first ground for its conclusion is also present in the instant case. The Uniform Anatomical Gift Act is, as its name implies, largely consistent in the states which have adopted it, one of which is Michigan. In Michigan, the provision cited by the Court in *Brotherton* (Ohio Rev. Code § 2108.02(B)), is found at Mich. Comp. Laws § 333.10102. The provision allows certain relatives to make an anatomical gift of a decedent's organs absent knowledge of contrary indications by the decedent. Mich. Comp. Laws § 333.10102. Further, the third ground is also present in Michigan law. *Deeg v. Detroit,* 345 Mich. 371 (1956) (recognizing the tort of interference with the right of burial of a deceased person without mutilation).

The second ground for the Court's conclusion in *Brotherton,* however, is not present in Michigan law. The Court in *Brotherton,* relied on the Ohio Appellate decision in *Everman, supra.* The language cited reads as follows:

> There is no issue in this case of the possessory right of a spouse or other appropriate member of the family of a deceased for the purposes of preparation, mourning and burial. This right is recognized by law, and by the decisions. R.C. 313.14. This is not to say that a person has a property right in the body of another, living or dead, or that a corpse may not be temporarily held for investigation as to the true cause of death. *Everman,* 54 Ohio App.3d at 122, cited in *Brotherton,* 923 F.2d at 481.

The statute referenced provides that "[t]he next of kin, other relatives, or friends of the deceased person, in the order named, **shall have prior right as to the disposition of the body of such deceased person.**" Ohio Rev. Code

§ 313.14 (emphasis supplied) (section entitled "notification of relatives; disposition of property."). There is no such provision under Michigan law. Michigan law lists, in order of ability to authorize, those able to donate the organs of the deceased, but does not equate this ability to choose the disposition of the body with a "right" as does the Ohio statute. Mich. Comp. Laws § 333.10102(2).[7]

A further distinction between the Ohio appellate decision in *Everman* and Michigan case law is that Michigan expressly describes the interest a family member has in the body of a deceased relative as giving rise to recovery in tort only. The Ohio Court in *Everman* recognized a possessory interest in the disposition of a deceased's body but did not address the type of redress violation of this right would evoke. *Everman, supra.* Michigan appellate decisions, on the other hand, state that:

> While there is no property right in the next of kin to a dead body, Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation. *Tillman v. Detroit Receiving Hospital,* 138 Mich. App. 683, 686-687 (1984) (emphasis supplied).

Thus, Michigan has specifically addressed this right to possess or control the disposition of a deceased person's body as one which carries redress in tort, and not in

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[7] Notification of next of kin and procedure regarding personality found on deceased person are discussed at Mich. Comp. Laws § 52.205(4) and § 52.208.

property, if violated. *Id.; See also, Allinger v. Kell,* 102 Mich. App. 798, 808 (1981) ("The unlawful and intentional mutilation of a dead body gives rise to a cause of action for damages. This right of recovery is based upon principles of tort and contract law.") (opinion of Allen, J.). In addition, Michigan Courts have stated that the proper damages under this tort are "measure[d] [by] the mental anguish or humiliation suffered by the plaintiffs who have been denied the comfort of knowing that the deceased has been given a comfortable and dignified retiring place." *Allinger,* 102 Mich. App. at 809. Where Michigan courts have chosen to limit the rights given by its own common law decisions, this Court should abide by such limitation, especially where, as here, the limitation is one that is not devoid of logic, nor one that applies a label which does not match its underlying substance.[8]

Concluding that any recovery to be had for mishandling of a corpse is to be founded in tort and not in property is consistent with the law in other states. Other states have expressly analyzed the tort of mishandling of a corpse as one of negligent or intentional infliction of emotional distress. *Leonard v. Kurtz,* 234 Ill.App.3d 553, 600 N.E.2d 896 (1992) (finding wrongful cremation of spouse did not vitiate the requirement that plaintiff show resultant physical injury to recover for negligent infliction of emotional distress); *Jobin v. McQuillen,* 158 Vt. 322, 609 A.2d 990 (1992) (recognizing right of possession in

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[8] Contrast, *Brotherton,* where the Sixth Circuit held that the label Ohio had placed on the interest of a relative to direct the disposition of a deceased's body did not reflect the actual interest granted by law. *Brotherton,* 923 F.2d at 482.

body of deceased and analyzing claim as one of intentional or negligent infliction of emotional distress, also finding that retention of brain for scientific study was not so extreme or outrageous as to satisfy the first element of the tort); *Christensen v. Superior Court of Los Angeles County,* 54 Cal.3d 868, 820 P.2d 181, 2 Cal.Rptr.2d 79 (1992) (finding that holders of statutory right to control disposition of human remains had standing to seek damages for emotional distress from biological supply company which allegedly requested and purchased from crematoriums human organs and body parts that were allegedly "harvested" without permission); *Hackett v. United Airlines,* 364 Pa.Super. 612, 528 A.2d 971 (1987) (surviving daughter's claim of infliction of emotional distress based on damage sustained by casket and body of deceased mother during transit for funeral failed to state cause of action for infliction of emotional distress where alleged mistreatment of the dead was merely negligent and daughter did not witness the mistreatment).

At least one state has surmised that mishandling of a corpse (mutilation of the body of a deceased) was the first cause of action allowing recovery for emotional distress:

> While a majority of courts have allowed independent recovery only for the intentional infliction of mental distress, a significant minority first permitted recovery for the negligent infliction of mental distress only as a parasitic tort, or as an independent tort in special situations, such as the negligent transmission of a message and the negligent mishandling of corpses where, on its face, there is a special likelihood that mental distress will result. *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758 (1974).

Physical harm to the plaintiff family member who witnesses the person's injury "fairly contemporanouesly" with the injury are not required for the tort of mutilation of the body of a deceased person because such a heinous action presumptively causes severe emotional distress to the loved ones who would have a right to decide disposition of the deceased's body. *Leong, supra.*

Although Michigan Courts have not squarely addressed whether the tort that it recognizes for the mishandling of a corpse should be considered one of the emotional distress torts, Michigan has allowed recovery for emotional distress by immediate family members who witness injury to family members "fairly contemporaneously" where such witness causes physical harm to the plaintiff. *See, e.g., May v. Beaumont Hospital,* 180 Mich. App. 728 (1989); *Wargelin v. Mercy Health Corp.,* 149 Mich. App. 75 (1986); *Berger v. Weber,* 411 Mich. 1 (1981). A failure to categorize mutilation of a dead body as not only a tort, but also an emotional distress tort, could be due to the recognition of a tort of "interference with the right of burial of a deceased person without mutilation" long before the tort of intentional or negligent infliction of emotional distress.[9] Therefore, it seems possible that no re-categoration of the mutilation of a body tort was made after creation of the negligent and intentional infliction of emotional distress torts.

The Court notes, however, that although Michigan has not expressly categorized (or re-categorized) the tort

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[9] The tort of interference with the right of burial of a deceased person without mutilation was recognized at least by 1956. *Deeg v. Detroit,* 345 Mich. 371, 375 (1956).

as one of negligent or intentional infliction of emotional distress, the Court of Appeals has felt compelled to grapple with the issue of whether the anguish need be "contemporaneous" with the mutilation, which is to grapple with an element of the emotional distress torts. *Allinger,* 102 Mich. App. at 809; *see also, Vogelaar v. United States,* 665 F.Supp. 1295, 1306 (E.D.Mich. 1987).

Regardless of whether the tort recognized by Michigan is one sounding in emotional distress, it is clearly a tort based on interference with the right of burial of a deceased person without mutilation and not a property interest. *Tillman, supra.*

Therefore, Michigan law is sufficiently different from Ohio law to render the result different from that in *Brotherton.* Michigan has expressly declined to recognize a property interest in the body of a deceased person but rather, has carefully chosen to provide recovery in tort only when the right of burial of a deceased person without mutilation is violated. *Tillman, supra.* Furthermore, the Court notes that Michigan is not alone in concluding that any theory of recovery for interference with the right to burial without mutilation lies in tort alone. *Leonard v. Kurtz; Jobin v. McQuillen; Christensen v. Superior Court of Los Angeles County; Hackett v. United Airlines.* Michigan may desire, in the future, to expressly join these other states in categorizing the tort as one for infliction of emotional distress.

Since Michigan does not recognize any property interest in the deceased body of another,[10] either expressly or implicitly, there can be no protection of that interest under the due process clause of the Fifth Amendment that would give rise to a cause of action under 42 U.S.C. § 1983. *Brotherton*, 923 F.2d at 480, 482. Accordingly, the Court need not reach the issues of pre-deprivation versus post-deprivation process, immunity, or personal jurisdiction of defendant Raber. *Martinez v. California*, 444 U.S. 277, 284 (1980).

IV. Conclusion

For the reasons stated above, the defendants' motions to dismiss are hereby GRANTED and this cause of action is DISMISSED with prejudice to any claim based upon due process under 42 U.S.C. § 1983 and without prejudice to the plaintiff's ability to file state law claims in state court.

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[10] This conclusion is supported by the decision in *Montgomery v. County of Clinton*, 940 F.2d 661, 1991 WL 153071 (6th Cir. (Mich.)) ("There is no merit in the procedural due process claim founded on the state statutory requirement that the medical examiner make a diligent effort to notify the next of kin as to the decision to perform an autopsy. Whatever the nature of the right created by the statute there is an insufficient liberty or property interest under this statute to create a valid procedural due process claim. . . . We would distinguish this case from *Brotherton*.").

IT IS SO ORDERED.

/s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT
JUDGE

DATED: March 23rd, 1994